

*N.B. This English article constitutes an unofficial translation of the Swedish version.*

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## **The criminalisation of unauthorised financial activities on 1 March 2026 may have major consequences for underwriters**

### **Introduction**

The Swedish Government has proposed new legislation introducing criminal liability for unauthorised financial activities.<sup>1</sup> According to the law, anyone who intentionally or through gross negligence conducts financial activities that require a licence or registration without the necessary licence or registration may be sentenced to a fine or imprisonment. The law is proposed to come into force on 1 March 2026.

The law aims to combat financial crime, such as money laundering. In its consultation response, the Swedish Financial Supervisory Authority (the "SFSA") states that criminal liability should be limited to activities relating to currency exchange, payment services and crypto assets, as these activities are particularly vulnerable to being used for criminal purposes and are conducted to a relatively large extent without authorisation or registration.<sup>2</sup> However, despite the SFSA's objection, the legislative proposal covers all financial activities subject to licensing or registration requirements.

In the case of share issues in listed companies, authorisation may, for example, be required for financial advisers who contact investors on behalf of the company and for investors/guarantors who enter into underwriting agreements.<sup>3</sup> In our experience, underwriting agreements are sometimes entered into by unlicensed actors, particularly in smaller listed growth companies that attract fewer institutional investors. Such underwriting may be permitted if it is not conducted on a professional basis; however, determining where this threshold lies is not always straightforward.<sup>4</sup>

To date, the primary regulatory risk in such situations has consisted of supervisory measures by the SFSA, typically in the form of injunctions ordering the actor to cease the activity. With the criminalisation of unauthorised financial activities, the risk profile is significantly sharpened, making it even more important to ensure that all required licences are in place.

### **When is a licence required?**

#### Licensing requirement for securities operations

According to Directive 2014/65/EU on markets in financial instruments (MiFID II), which has been implemented through the Securities Market Act (2007:528) (the "SMA"), a licence is required to conduct securities operations, which is defined as operations which comprise providing investment services or conducting investment activities on a professional basis.<sup>5</sup>

Under Chapter 2, Section 1 SMA, authorisation for securities operations may be granted for, inter alia, the following activities:

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<sup>1</sup> Prop. 2025/26:42.

<sup>2</sup> See FI ref. no. 24-28528, (link [here](#)), page 1.

<sup>3</sup> An underwriter agreement refers to an agreement between a listed company and a guarantor which, in return for remuneration, undertakes in the agreement to subscribe for shares that others do not subscribe for in a share issue in the company.

<sup>4</sup> Cf. the SFSA's agrees that it is often difficult to assess whether financial activities are subject to authorisation or registration, see FI ref. no. 24-28528, page 2.

<sup>5</sup> Chapter 1, Section 4 c, last paragraph, SMA.

- Receipt and transmission of orders (item 1) – intermediaries who receive customer orders and transmit them to, for example, a bank that places the order with the trading venue (the intermediary does not execute the order itself).
- Execution of orders on behalf of clients (item 2) – typically stock exchange members (e.g. Nordnet and Avanza) who execute customer orders on the trading venue, but also, for example, an issuing agent that carries out subscriptions on behalf of investors in a share issue.
- Dealing on own account (item 3) – e.g. liquidity providers or other securities institutions trading from their own inventory as part of their business.
- Underwriting and placement with firm commitment (item 6) – underwriter agreements and other forms of placement where the securities institution first subscribes for/acquires the shares itself.
- Placement without firm commitment (item 7) – placement without subscribing/acquiring the shares, e.g. compiling an underwriting book in a share issue without itself acting as an underwriter.

### Exceptions

There are several exceptions to the licensing requirement, e.g. dealing *solely* on one's own account, such as investment companies, professional day trading, etc.<sup>6</sup> Certain professions (e.g. lawyers) are also generally exempt when they perform investment services within the scope of their professional activities and the investment services are of a temporary nature or without special remuneration.<sup>7</sup> A company that, within the scope of its own capital raising, contacts investors and negotiates and/or compiles an underwriting book should likewise not be considered to be conducting licensable activities.

### Ancillary services and ancillary operations

According to Chapter 2, Section 2 SMA, a securities company may, with the permission of the SFSA and as part of its business, inter alia (i) provide advice to undertakings regarding capital structure, company strategy and similar issues, as well as provide advice and perform services in conjunction with mergers and corporate buyouts (i.e. typical corporate finance services) (item 3), and (ii) perform services in connection with the underwriting of financial instruments, e.g. assist in the drafting of terms and conditions, prospectuses or marketing material (item 6).

A financial adviser in a share issue normally requires both of these authorisations. It should be noted that ancillary services are not subject to authorisation in themselves and therefore only require authorisation if they are provided together with investment service pursuant to Chapter 2, Section 1 SMA.

A fundamental principle is that an authorised firm may only conduct the activities covered by its authorisation. An exception to this principle arises where the SFSA grants permission to conduct *other ancillary operations* (and currency trading).<sup>8</sup> For example, the SFSA has approved activities in the form of certified advisers as other ancillary operations.<sup>9</sup>

### Tied agent

An operator may enter into an agreement to act as a tied agent for a licensed securities institution. The agent may then, on behalf of the institution and without its own licence, perform the tasks specified in Chapter 1, Section 4b SMA, i.e. promote investment services or ancillary services (item 1), receive or transmit orders/instructions (item 2), place financial instruments (item 3) and provide investment advice

<sup>6</sup> Chapter 2, Section 5, item 7 SMA.

<sup>7</sup> Cf. Chapter 2, Section 5, items 6 and 12, SMA.

<sup>8</sup> Chapter 2, Section 3 SMA.

<sup>9</sup> Lindholm, *MiFID II/MIFIR – hörnstenen i regleringen av värdepappersmarknaden* (2025, version 1, JUNO), page 53.

(item 4). The activities are conducted within the scope of the institution's authorisation and under its responsibility.

It should be noted that Chapter 1, Section 4b SMA does not cover underwriting or other investment services under Chapter 2, Section 1 SMA that involve a balance sheet risk, such as dealing on own account. In our view, a tied agent may therefore not engage in professional underwriting activities, even if the securities institution has the necessary authorisation. Furthermore, the wording of the list in the provision does not fully correspond to the description of investment services and ancillary services in Chapter 2, Sections 1 and 2 SMA. The significance of this discrepancy is somewhat unclear. For example, is only the *promoting* of ancillary services permitted, or may the agent also *perform* ancillary services? In the preparatory works, this issue is addressed by emphasising that the agent must always remain within the limits of the securities institution's authorisation.<sup>10</sup>

### **Further on the requirement of professionalism**

A prerequisite for all licensing requirements under the SMA is that the activity is conducted on a professional basis. Professionalism implies that the activity must involve more than isolated assignments. The preparatory works mention, as an example of an activity not covered, a lawyer who only occasionally participates in securities transactions, such as in the context of a division of marital property.<sup>11</sup>

Exactly where the threshold for professionalism lies requires an overall assessment, in which factors such as how the service is marketed are relevant.<sup>12</sup> With respect to underwriting, the SFSA stated in a 2007 report that relevant circumstances include whether the underwriter is already a shareholder in the issuer, what income the underwriting generates, and how frequently the person or company acts as an underwriter.<sup>13</sup>

From a case-law perspective, the SFSA's decision against Capensor Capital AB (FI Ref. No. 16-13171) is noteworthy. The SFSA found that the requirement of professionalism was met because the company repeatedly entered into a large number of agreements to introduce investors in connection with issues and underwriting (11 in 2015 and 17 in 2016). The SFSA did not accept Capensor's argument that the underwriting merely constituted support for portfolio companies (i.e. trading solely on its own account, which is exempt from licensing requirements), referring instead to the fact that subscription commitments would have been more natural in such a situation than underwritings against remuneration. The SFSA also considered it irrelevant that the remuneration subject to authorisation was small in relation to the company's total turnover and profit.<sup>14</sup>

Even underwriting on a smaller scale than that carried out by Capensor may be subject to licensing requirements. Where the exact line goes is not clear and must be assessed on a case-by-case basis.

### **What does criminalisation entail?**

If someone conducts activities that require authorisation without an applicable license, the SFSA shall intervene by either ordering the actor to cease the activities or by imposing an administrative punitive fine.<sup>15</sup> Such an order may be accompanied by a conditional fine.<sup>16</sup> In respect of underwritings, the SFSA has stated that the licence requirement applies to legal persons acting in a professional capacity, while private individuals may be ordered to cease the activity.<sup>17</sup>

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<sup>10</sup> See prop. 2006/07:115, page 378.

<sup>11</sup> Prop. 2006/07:115, page 554.

<sup>12</sup> Lindholm, *MiFID II/MiFIR – hörnstenen i regleringen av värdepappersmarknaden (2025, version 1, JUNO)*, page 37.

<sup>13</sup> FI 2007:12 (link [here](#)), page 9 and forward.

<sup>14</sup> Cf. FI Dnr 16-13171, page 7.

<sup>15</sup> Chapter 25, Section 17 SMA.

<sup>16</sup> Chapter 25, Section 29 SMA.

<sup>17</sup> Cf. FI 2007:12, page 9.

The new criminal legislation means that licensable activities conducted without authorisation may, in cases of intent or gross negligence, instead lead to criminal liability. The penalty scale includes fines or imprisonment for a maximum of two years, and in cases of serious offences, imprisonment for a minimum of six months and a maximum of six years. Minor cases are exempt from liability. Corporate fines may also be imposed on legal entities.

It should be noted that criminal liability does not extend to various forms of approvals that are subordinate to the basic requirement for a licence or registration for the relevant financial activity, including ancillary services and ancillary operations.<sup>18</sup>

One consequence of criminalisation is that additional investigative measures become available in cases of suspected violations. The SFSA is currently limited to issuing orders to the company to provide information.<sup>19</sup> Criminal proceedings in cases of suspected unauthorised financial activities allow the full range of investigative tools available to the police and prosecutors under the Swedish Code of Judicial Procedure (Sw. *Rättegångsbalken*) to be used.

### **Typical examples of licensable activities in connection with share issues**

#### Financial advisers

In connection with a share issue, the company often engages a financial adviser to assist with the transaction. The assignment typically includes investor contacts, determining the transaction terms, compiling an underwriting book, and preparing prospectuses and marketing material. For such an assignment, the financial adviser generally requires authorisation at least for reception and transmission of orders, placement without firm commitment, and ancillary services pursuant to Chapter 2, Section 2, items 3 and 6 SMA.<sup>20</sup>

In certain structures, the adviser (in practice often an issuing agent) may also assume a role involving licensable dealing on its own account, for example in quota value issues where the adviser itself subscribes for the shares in the issue for onward transfer to investors. Such authorisation is also required if the financial adviser provides services as a liquidity provider/market making. If the adviser collects application forms and subscribes for shares in a share issue on behalf of the subscriber, authorisation to execute orders on behalf of clients is also required.

#### Underwriters

If the financial adviser participates as an underwriter in the transaction – and not merely by compiling an underwriting book of other parties – an underwriting licence is also required. Other parties participating in the underwriting likewise require such authorisation, provided the activity is conducted on a professional basis.

Private individuals may not apply for a licence under the SMA. Professional underwriting may therefore not be conducted by private individuals. Private individuals may engage in underwriting in isolated assignments, whereas more regular or organised underwriting is not permitted.

For existing shareholders, whether legal or private individuals, entering into subscription commitments without remuneration should constitute such trading solely on one's own account which is exempt from licensing requirements.

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<sup>18</sup> Prop. 2025/26:42, page 20.

<sup>19</sup> Chapter 25, Section 17, paragraph 2 SMA.

<sup>20</sup> Cf. the SFSA's decision in FI Dnr 16-13171 (Capensor Capital). Capensor described itself as an investor and financial advisor with investments for its own account similar to an investment company (not subject to authorisation) and various consulting and advisory services for, among other things, IPOs and capital raising and participation as an underwriter. The SFSA found that the company's structure meant that several main services were subject to authorisation under Chapter 2, Section 1 SMA (receipt/transmission of orders, dealing on own account, underwriting and placement with and without a firm commitment) and that the business also involved ancillary services under Chapter 2, Section 2, items 3 and 6 SMA.

### Sub-underwriter

It is not uncommon that an underwriter (the lead underwriter) compiles its own underwriting book with its own investors (sub-underwriters). The lead underwriter then enters into an underwriting agreement with the listed company and subscribes for the shares in the share issue if the underwriting is called upon, subsequently transferring the shares to the sub-underwriters under separate agreements.

The lead underwriter requires at least an underwriting licence for such activities. It is doubtful whether the sub-underwriters are subject to licensing requirements, as underwriting typically targets the party subscribing in the share issue. However, if the sub-underwriter conducts the activity for remuneration (for example by receiving part of the underwriting fee paid by the company to the lead underwriter) and otherwise on a professional basis, our assessment is that there is a significant risk that licensing requirements may still apply.

### **Conclusions**

The new criminal legislation does not extend the scope of the licensing requirements. However, it tightens the consequences for those who conduct financial activities subject to licensing or registration without the necessary authorisation or registration, as such conduct – in cases of intent or gross negligence and with the exception of minor cases – may lead to criminal liability. The investigative possibilities also change in practice, as the matter may become subject to a criminal investigation with the expanded procedural tools that this entails compared to the SFSA's current, more limited toolbox.

Since a single general licence is insufficient – each line of business that is subject to licensing requirements must be covered by the authorisation – actors with existing licences face criminal law risk if their actual activities extend beyond the scope of their authorisations. Financial advisers should therefore carefully ensure that they hold all licences required for the activities they conduct.

The criminalisation is particularly significant for underwriters and sub-underwriters. In connection with capital raisings in smaller listed companies, it is our experience that such actors – often larger private investors – frequently lack authorisation. Many of these actors participate repeatedly as underwriters, which risks being regarded as professional underwriting.

Actors who lack authorisation but repeatedly participate as underwriters now face the choice of either applying for an underwriting licence or ceasing such activities. Underwriting cannot be conducted in the form of a tied agent. If the underwriter is a natural person and wishes to obtain authorisation, a company must first be formed, as licences are not granted to private individuals. The application process is time-consuming and may be costly, involving, inter alia, requirements for initial capital (for underwriting or placement with firm commitment, initial capital of EUR 750,000 is required),<sup>21</sup> ongoing capital requirements, internal governance and control, compliance functions, etc.

For listed companies, a reduction in the number of underwriters may result in capital raising becoming more expensive or otherwise more difficult. In practice, there is a real risk that rights issues will no longer be possible to underwrite in listed growth companies. One way to counter an unjustified negative market effect would be to clarify when licensing requirements arise in connection with underwriting. This would also be beneficial from a legal certainty perspective, as it is problematic when it is not clear in advance what conduct is permitted and what is punishable.<sup>22</sup> Such guidance could be issued by the SFSA and should, where possible, include predictable criteria for assessing whether professionalism exists, for example threshold values regarding number of underwriting agreements and the total underwritten amount.

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<sup>21</sup> Chapter 3, Section 6, item 2 SMA.

<sup>22</sup> Cf. the SFSA's similar argument in its consultation response, FI ref. no. 24-28528, page 2.